

No. 14,520

IN THE

United States Court of Appeals  
For the Ninth Circuit

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MARK MYERS,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

BRIEF OF APPELLANT.

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**STATEMENT OF PLEADINGS AND JURISDICTION.**

A criminal complaint was filed against Appellant in the United States Commissioner's Court for the Fairbanks (Big Delta) Precinct, Fourth Division, Territory of Alaska, charging Appellant with the violation of Section 50-5-3 of Alaska Compiled Laws Annotated, 1949, said charged crime being that of Operating a Motor Vehicle While Under the Influence of Intoxicating Liquor.

Jurisdiction of said Court is provided by Section 69-2-1 of Alaska Compiled Laws Annotated, 1949, which said Section is, in part, as follows:

“69-2-1. Criminal Jurisdiction of Justices' Courts: That a Justice's Court has jurisdiction of the following crimes: \* \* \*

Third. Of any misdemeanor punishable by imprisonment in the county jail, or by fine, or by both."

An appeal was taken to the District Court for the District of Alaska, Fourth Division, under the provisions of Section 69-6-1 of Alaska Compiled Laws Annotated, 1949, which said Section is, in part, as follows:

"69-6-1. Right to Appeal. That an appeal may be taken from a judgment of conviction given in a Justice's Court, in a criminal action, to the District Court \* \* \*."

As used in said Section, the words "District Court" refer to the District Court for the District of Alaska, which said Court was established and is provided for by Title 48, Section 101, United States Code. Said Section is, in part, as follows:

"There is established a District Court for the District of Alaska, with the jurisdiction of District Courts of the United States and with general jurisdiction in civil, criminal, equity and admiralty causes; \* \* \*"

The jurisdiction of this Court is provided by the provisions of Title 28, U.S.C.A., Section 1291, reading as follows:

"The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the District Court for the Territory of Alaska, \* \* \* except where a direct review may be had in the Supreme Court."

The decision here appealed from is a final decision, the same being a Judgment of Conviction in a criminal case.

The venue of this Court is established by Title 28, U.S.C.A., Section 1294 (2).

The complaint in this cause appears on pages 3 and 4 of the printed record.

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#### **STATEMENT OF THE CASE.**

Upon trial in the District Court for the District of Alaska, Fourth Division, on the 10th day of June, 1954, Appellant was convicted and sentenced to serve a term of six months in the Federal Jail, to pay a fine in the amount of Four Hundred Dollars (\$400.00) and to have his driver's license revoked for a period of one year.

The record reflects that after work on the 27th day of March, 1954, Appellant went to that certain business establishment near Big Delta, Alaska, known and being operated as Hunter's Lodge for the purpose of assisting the owner set up a generator and put it into operation. He arrived there at approximately 5:30 P.M. Patricia Bowers, apparently his girl friend, arrived there at about 7:00 P.M. (Tr. 95). Appellant did considerable work on the generator during the course of the evening and, during the course of such work, drank several bottles of beer. The evidence is not clear as to the number of beers Appellant did consume at Hunter's Lodge since no accurate count was made.

Appellant and Patricia Bowers left Hunter's Lodge at approximately midnight and went to the Club Trio (Tr. 96). Patricia Bowers had been drinking considerably and it had a bad effect upon her (Tr. 98). They stayed at the Club Trio about one hour and Appellant had one beer (Tr. 97, 129). Patricia Bowers had two additional drinks (Tr. 129).

When they left the Club Trio at approximately 1:00 o'clock A.M. Patricia Bowers wanted to go to the Triangle Lodge. Her speech was "getting a little thick" and Appellant "realized it was too late to go any place in her condition" and decided that it was best to go home (Tr. 109). She threatened to jump out of the truck if he wouldn't take her where she wanted to go. Appellant "kind of laughed and said, well, go ahead." Patricia Bowers "opened the door and kind of half-rolled out. She didn't jump. She rolled." Appellant "don't think she had any intention of jumping out." He thinks it was an accident (Tr. 109).

Appellant stopped the truck as soon as he could, ran back to where she was and tried to pick her up. She was limp and he could not carry her so he ran back to the truck and got an army blanket and laid it over her. There was no traffic on the road and no sign of help so he got in the truck and guided it around her and parked so that the lights of the truck were shining on her (Tr. 109).

Appellant went immediately to the home and office of Gene Morris (Territorial Policeman) and requested his wife to summon an ambulance and to

notify Mr. Morris of the accident. He went back to the truck and stood by Patricia Bowers' body until help arrived. Mr. Morris was the first to arrive (Tr. 90). He arrived at 1:20 A.M. (Tr. 25).

When he arrived Appellant was kneeling by the body (Tr. 14) and was sobbing and weeping (Tr. 27). After a bit of conversation in which Mr. Morris offered his condolences (Tr. 91), Appellant was requested by Mr. Morris to drive his truck back down to the Territorial Police headquarters. This was done by Appellant (Tr. 37 et seq.). The actions of Appellant immediately subsequent to the accident were such as would have been taken by a reasonable and prudent person (Tr. 33).

According to the record Appellant was questioned rather extensively a short time after the accident. The first such questioning was done at the office of the Territorial Police at Big Delta. The parties later moved to the Army Base where questioning continued until about 7:00 o'clock in the morning.

During the course of the questioning at the Army Base and at approximately the hour of 3:30 A.M., a picture was taken of Appellant (Tr. 75). This picture was admitted in evidence upon trial as Government's Exhibit "A" (Tr. 86).

Appellant was brought into Fairbanks, Alaska, and confined in the Federal Jail. At the time of his confinement, Gene Morris was not "sure whether he would be charged with manslaughter or whether he would be charged with drunk driving" (Tr. 26).

A coroner's inquest was held and "the coroner's jury brought in a verdict of not guilty." Appellant was, therefore, charged with drunk driving.

Upon trial in the District Court for the District of Alaska, Fourth Division, and at the time of the resting of plaintiff's case, defendant moved the Court for a Judgment of Acquittal (Tr. 87), upon the grounds that there had been a total failure upon the part of the Government to prove the material allegations in the Complaint and that there was no showing that the defendant did in fact operate a motor vehicle while under the influence of intoxicating liquor.

At the time both parties rested, defendant did again move the Court for a Judgment of Acquittal (Tr. 134), said motion being based upon the same grounds.

After the return of the verdict of guilty by the Jury, defendant did again move the Court for a Judgment of Acquittal based upon the grounds that the verdict was contrary to the law and the evidence adduced upon trial. Said motion appears at page 5 of the printed transcript.

All of said motions were denied by the Court.

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#### **SPECIFICATION OF ERROR.**

Appellant specifies as error that the Court below erred in denying appellant's motion for Judgment of Acquittal made at the close of all of the evidence.

### ARGUMENT.

In order to sustain a conviction for operating a motor vehicle under the influence of intoxicating liquor under our statute, at least two things must be affirmatively established. They are: (1) that the person charged did in fact operate a motor vehicle on a public highway and (2) that the person charged was in fact under the influence of intoxicating liquor (within the legal meaning of said term) at the time of such operation.

In the case of *People v. Strauss*, a New York case reported in 22 N. Y. S. 2d at page 880, the Court stated:

“Strict construction of the penal statute in question must be had. *People v. Nelson*, 133 N.Y. 90, 94, 46 N. E. 1040, 60 Am. St. Rep. 592 \* \* \* . Under the statute, intoxication and operation must be simultaneous or there is no crime.”

The fact that appellant was driving his truck is admitted and not in issue. However, it is denied that appellant was under the influence of intoxicating liquor at the time of its operation. There must of necessity be some connection between the intoxicating liquor and the motor vehicle.

In *State v. Andrews*, a Connecticut case reported in 142 Atl. at page 840, the Court stated:

“Under the provisions of our statute, this offense is established when the evidence shows that the driver of an automobile, by reason of having drunk intoxicating liquor, had become so affected in his mental, physical or nervous processes that

he lacked to an appreciable degree the ability to function properly in relation to the operation of the machine.” (Emphasis ours.)

The term “appreciable” is defined by the Court in the case of *State v. Bowen*, 39 S. E. 2d 740, as follows:

“Appreciable means large or material enough to be recognized or estimated; perceptible.”

The only testimony contained in the record relative to the operation of the motor vehicle in question comes from appellant himself. He stated that he was driving it. Other witnesses stated that he had admitted to them that he was its driver. The record is barren of any testimony as to the manner in which the vehicle was being operated. It follows, then, that any assumption that Appellant was “operating a motor vehicle while under the influence of intoxicating liquor” must be a conclusion arrived at after a consideration of other factors.

A determination of this matter depends upon the effect to be given to the words “operating a motor vehicle while under the influence of intoxicating liquor.” This set of words has been the subject of much judicial discussion. The grandfather of all of the cases dealing with the subject is the case of *People v. Dingle*, a California case reported in 205 Pac. at page 705.

In ascertaining just what degree or kind of influence comes within the purview of such statutes, the Court stated the following:

“It doubtless is true that not any and every influence produced by intoxicants will subject one to the penalties prescribed by the statute for this offense. As was said by the Wisconsin Supreme Court in *Bakalars v. Continental Casualty Company*, 141 Wis. 43, 122 N. W. 721, 25 L. R. A. (NS) 1241, 18 Ann. Cas. 1123; ‘The influence of intoxicants is a very elastic term.’ There the court was considering the meaning of the phrase ‘under the influence of any intoxicant’ as used in an accident insurance policy. Upon the question of the discernible effects of intoxicating liquor, the Wisconsin Court further said: ‘We are told by physicians and experimenters that the most trifling quantity of alcohol has some effect, and that its effect persists for days, if not permanently, so that one is literally under the influence from a single ordinary portion. We know as a matter of common knowledge that one of the first influences may be to stimulate those very faculties of observation and alertness which would improve the capacity of the subject to shield himself from danger, or escape, and that some such degree of influence of intoxicant would not in any respect increase the peril of injury.’ If, as stated by the learned author of the opinion in this Wisconsin case, the most trifling quantity of alcohol produces an influence that will persist for days, if not permanently, it is natural and almost necessary assumption that the words ‘under the influence of intoxicating liquor’ were not inserted in the Motor Vehicle Act for the purpose of fastening guilt in the case of every and any ‘influence’ due to the use of intoxicating liquors, however slight. The field, therefore, is open for construction to ascertain just what degree or

kind of 'influence' is within the purview of the statute.

We shall not assume to give any complete or all-inclusive definition of these words of the statute. We shall not undertake to express with precision the exact constituent ingredients of the word 'influence,' as employed in this act. However, with respect to the meaning of the phrase 'under the influence of intoxicating liquor,' as used in this statute, we think we are well within the bounds of accuracy in saying that if intoxicating liquor has so far affected the nervous system, brain or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver is 'under the influence of intoxicating liquor' within the meaning of the statute."

And in the case of *State v. Carrol*, a North Carolina case reported in 37 S. E. 2d at page 688, the Court stated the following:

"The meaning of the phrase 'under the influence of liquor', is defined in Black's Law Dictionary, 3rd Edition, p. 1775, as follows: 'In statutes or ordinances relating to the operation of motor vehicles, it has been construed as equivalent to the words, "in an intoxicated condition," *State v. Dudley*, 159 La. 872, 106 So. 364, 365, and to the words "in a drunken or partly drunken condition", *Daniels v. State*, 155 Tenn. 549, 296 S. W. 20, 23, but not as synonymous with the words

“while intoxicated”, Cannon v. State, 91 Fla. 214, 107 So. 360, 362.’ The expression is said to cover not only all the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors and which tends to deprive the driver of that clearness of intellect and control of himself which he would otherwise possess. Latimer v. Wilson, 103 N. J. L. 159, 134 Atl. 750, 751. It is applicable to the condition created where intoxicating liquor has so far affected the nervous system, brain or muscles as to impair to an appreciable degree his ability to operate an automobile in a manner that an ordinarily prudent and cautious man in the full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions. People v. Dingle, 56 Cal. App. 445, 205 Pac. 705, 706; People v. McKee, 80 Cal. App. 200, 251 Pac. 675, 677.”

Perhaps it would be well to review briefly the testimony of the witnesses upon which the jury arrived at the conclusion that appellant was in fact “operating a motor vehicle while under the influence of intoxicating liquor”—the “other factors” as mentioned above.

Three witnesses were presented by the Government in support of its theory that appellant was “operating a motor vehicle while under the influence of intoxicating liquor.” They were Gene Morris, a member of the Alaska Territorial Police; Charles Althouse, a

military policeman, and Edwin English, an army photographer.

Gene Morris testified that he could detect that appellant had been drinking by his breath (Tr. 15); that "he had a tendency to stoop forward. His balance, although not extremely bad, was impaired" (Tr. 16); that appellant "seemed to go to sleep immediately when left alone for just a very short time, and in fact, faced with the fact that a friend of his had just been killed, it seemed a bit odd that he would want to go to sleep" (Tr. 18); he "based it due to the fact that the man was intoxicated" (Tr. 18); that based upon these observations he concluded that "at this time the man was highly intoxicated" (Tr. 16).

Charles Althouse testified that "at the scene of the accident Mr. Myers didn't, wasn't too steady on his feet and his speech was slightly incoherent and that's about it" (Tr. 50); "the man, Mr. Myers, that is, still seemed to be under the influence and also when woken up he would immediately drop back to sleep, fall back to sleep" (Tr. 50).

Edwin English testified that he didn't smell any liquor on appellant's breath (Tr. 76) but that he came to the conclusion that appellant was drunk because his walk "wasn't very stable, very slow" (Tr. 77) and because he would go to sleep.

Three witnesses were also offered on behalf of the defendant. They were Mark Myers, appellant; Al Marler, the owner of Hunter's Lodge, and Jess Tay-

lor, the bartender at the Club Trio, and the last man to see appellant prior to the accident.

Mark Myers, the appellant, testified that he was not under the influence of intoxicating liquor at the time that he left Club Trio (Tr. 105); that the accident happened five or six minutes later (Tr. 106); that he was emotionally upset; that Gene Morris knew that he was and offered him a sedative (Tr. 99); that his emotional disturbance continued on and at the time of the taking of the picture (Government's Exhibit "A") he was in a state of semi-stupor; and that the beer that he had consumed in no way affected his ability to drive or his reflexes (Tr. 103).

Al Marler testified that appellant was at his place of business from shortly after 5:00 o'clock P.M. until around midnight (Tr. 121-122); that appellant drank some beer while working on a generator for the witness and that in his opinion appellant was not under the influence of intoxicating liquor when he departed (Tr. 123).

Jess Taylor testified that appellant stayed at the Club Trio for approximately an hour and left at about 1:00 o'clock (Tr. 109); that appellant drank one beer while there and that he was not under the influence of intoxicating liquor at the time he left at 1:00 o'clock, just six minutes before the accident (Tr. 129).

Certainly there is no basic conflict between the testimony offered on behalf of the Government and the defendant. The facts are all the same, the only differ-

ence being in the conclusions drawn or inferred from the same set of facts.

It is the contention of the government that the actions of Appellant subsequent to the accident were caused by the intoxicating liquor consumed by appellant.

It is the contention of appellant that those actions, if in fact any peculiar actions did take place, were the result of shock and emotional disturbances caused by the death of a loved one and the manner in which the death occurred.

What is shock and what effect does it have on a person?

“Shock” is defined as an insult to the nervous system. *Lumbermen’s Mutual Casualty Co. v. Brahan*, 48 F. Supp. 141.

A “shock” is a sudden agitation of the body or mind. It may affect either body or mind. *Haile’s Curator v. Texas & P. R. Co.*, 60 Fed. 557.

In the case of *Maynard v. Oregon R. Co.*, 72 Pac. 590, the Court stated:

“ ‘Shock’ is defined by Charles L. Dana, M.D., as a sudden depression of the vital functions especially to the circulation, due to the nervous exhaustion following an injury or sudden violent emotion, resulting either in immediate death or in prolonged prostration, and is spoken of as being either corporeal or physical, relating, respectively, to the vital powers and the emotions of the mind.”

And in the case of *Provident Life & Accident Ins. Co. v. Campbell*, 79 S. W. 2d 292, the Court stated:

“A ‘shock’ is defined as a sudden agitation of the physical or mental sensibilities; \* \* \*; a ‘mental shock’ is a sudden agitation of the mind; startling emotion, as the shock of a painful discovery, a shock of grief or joy; and in a medical or pathological sense, a ‘shock’ is a sudden depression of the vital forces of the entire body, or part of it, marking some profound impression produced upon the nervous system; \* \* \*; a prostration of the bodily functions, as from sudden injury or mental disturbance.”

Obviously, under the circumstances, appellant was under the influence of a powerful emotional shock. To presume otherwise would be absurd. The circumstances upon which the witnesses for the Government relied as a basis for their conclusions are as consistent with the contention of appellant that he was under shock as they are with the conclusions of intoxication reached by the Government. Common sense and an understanding of human nature reveal to one that they are much more consistent with the contention of appellant.

The attention of the Court is respectfully directed to the case of *State v. Sisneros*, a New Mexico case reported in 82 Pac. 2d at page 274, wherein it is stated:

“The evidence in the case, in its effect, is not dissimilar from that before the Court in the case of *Chairez v. State*, 98 Tex. Cr. Rep. 433, 265 S.W. 905. *In the instant case, the only testimony upon*

*which the witnesses claimed that the appellant was drunk comes from their conclusion from his acts subsequent to the collision and the injury which he received. All of the circumstances upon which the unfavorable conclusion was reached by the state's witnesses are quite as consistent with his innocence as with the guilt of the appellant; that is, all his acts harmonize with his theory that his confused, staggering and helpless condition was due to the injury rather than to intoxication.* The testimony was direct that there was no whiskey about the car. But one of the witnesses claimed to have noticed the odor of whiskey. On that subject, it was said by the Court in the *Chairez* case as follows:

“ ‘So explained the only testimony left to the State is that the smell of liquor was upon appellant's breath. This is denied by appellant and his witnesses, but conceding the testimony of the state's witnesses to be true in this respect we are not willing to say that under the facts of the case it shows appellant to have been driving an automobile at a time when he was drunk or to any degree intoxicated.’ ”

“*The main fact upon which the culpability of the appellant depends is his intoxication. The opinion of the state's witnesses upon that subject rests alone upon the accuracy of the inference they drew from the facts which they related touching the conduct of the accused after he was injured. The facts, so related, as stated above, are inconclusive, especially when tested by the law pertaining to circumstantial evidence. The evidence as a whole leaves this Court in such doubt touching its sufficiency to support the ver-*

dict that it does not feel warranted in sustaining the conviction.”

The death of Patricia Bowers was indeed regrettable. However, the coroner's jury found that it was accidental. It is regrettable also that the law enforcement officer, under such circumstances and at such a time, should devote his time and mind in deep meditation as to whether to charge appellant with manslaughter or drunk driving. It was not a time for such abnormal contemplation. It was a time for prayer.

It is respectfully submitted that the judgment of the trial Court should be reversed and appellant discharged.

Dated, Fairbanks, Alaska,  
July 6, 1955.

GEORGE B. MCNABB, JR.,  
*Attorney for Appellant.*

